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# In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PETITIONER

*v.*

CAJO TRADING, INC.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in this case on May 15, 1968.

**OPINIONS BELOW**

The opinion of the Customs Court, First Division (App. A) is reported at 56 Cust. Ct. 143, C.D. 2621. The opinion of the Court of Customs and Patent Appeals (App. B) is reported at 2 Cust. Bull. No. 10, p. 78 (March 6, 1968).

**JURISDICTION**

The judgment of the Court of Customs and Patent Appeals was entered on February 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

## QUESTION PRESENTED

Whether the 60-day limitations period provided by Section 514 of the Tariff Act of 1930 for protesting a tariff determination ("liquidation") by the Collector of Customs is applicable to a protest asserting that the liquidation was not in accordance with law because it applied a rate of duty established by a Presidential Proclamation subsequently held invalid.

## STATUTES INVOLVED

Section 505 of the Tariff Act of 1930, 46 Stat. 732, 19 U.S.C. 1505, provides:

> The consignee shall deposit with the collector, at the time of making entry, unless the merchandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation.

Section 514 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1514, provides:

> Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings en-

tering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury) * * * under any provision of the customs laws, and his liquidation or reliquidation of any entry, * * * shall, upon the expiration of sixty days after the date of such liquidation, * * * be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, but not before such liquidation * * * file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. * * *

Section 515 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1515, provides:

> Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties * * *. If the collector shall, upon such review, affirm his original decision, * * * then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Cutoms Court for due assignment and determination, as provided by law. * * *

## STATEMENT

Under Section 505 of the Tariff Act of 1930 (19 U.S.C. 1505), the consignee of imported merchandise

is required to deposit with the Collector of Customs, at the time of entry, the amount of duties which the Collector estimates is payable. Later, after receiving appraiser's and other reports, the Collector determines precisely the rate and amount of the duties owed. This process is referred to as "liquidation" of the rate and amount of duties. The Collector then gives the consignee notice of the liquidation and collects any additional duties due or refunds any excess which has been deposited.

Section 514 of the Act (19 U.S.C. 1514) provides that this liquidation by the Collector "shall, upon the expiration of sixty days after the date of such liquidation, * * * be final and conclusive upon all persons * * *, unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, but not before such liquidation * * * file a protest in writing with the collector * * *." Section 515 (19 U.S.C. 1515) goes on to provide that, upon the filing of a protest, the Collector shall review his prior decision; if he affirms it, he is to transmit the entry and all exhibits to the Customs Court for a determination of the dispute by that court.

The merchandise involved here, consisting of spring clothespins, was liquidated by the Collector of Customs at New York on December 27, 1957, and the duties were assessed at the rate of 20 cents per gross as directed by Presidential Proclamation No. 3211 (T.D. 54493). No protest was filed by the consignee against this liquidation within the 60-day limitations period prescribed by Section 514.

Thereafter, on October 18, 1961, the Customs Court, First Division, rendered its decision in the case of *Falcon Sales Co.* v. *United States,* 47 Cust. Ct. 129, C.D. 2292, holding that Presidential Proclamation No. 3211 was invalid because the President's action was beyond the authority granted to him by Congress. By this Proclamation the President had suspended the rate modification negotiated under the General Agreement on Tariffs and Trade applicable to spring clothespins, *i.e.,* from the full statutory rate of 20 cents per gross to 10 cents per gross. The government did not pursue an appeal of the *Falcon Sales* decision to the Court of Customs and Patent Appeals, in the belief that the case lost prospective importance when, some months after the decision, the President rescinded, in relevant part, Proclamation No. 3211. See Presidential Proclamation No. 3468, 27 Fed. Reg. 4235, 4236 (May 3, 1962).

Thereafter, on January 25, 1963, the consignee served a written demand on the Collector of Customs to liquidate the entry previously considered to have been liquidated on December 27, 1957, on the ground that the previous liquidation was void because based on an invalid Presidential Proclamation (R. 10–11). Upon the Collector's refusal to liquidate (R. 9, 12–13),[1] the consignee filed the protest which has given rise to the present litigation.

In the Customs Court proceeding, the consignee's position was upheld. That court concluded that there had been no valid liquidation because that which had

[1] In refusing the request to liquidate, the Collector noted that many similar requests had been received (R. 12).

occurred was under the authority of an invalid Presidential Proclamation. Accordingly, the protest was dismissed as premature (protests may be filed only after a liquidation has taken place), the Court holding that the Collector was under an obligation to liquidate the subject entry anew (App. 33–37).

In reaching its decision, the Customs Court relied on *United States* v. *C. O. Mason, Inc.*, 51 CCPA 107, C.A.D. 884, certiorari denied, 379 U.S. 999. There, the Court of Customs and Patent Appeals refused to apply the 60-day limitations period to a liquidation under a statute later held to be unconstitutional. Since Section 505 (19 U.S.C. 1505) of the Tariff Act requires the Collector of Customs to liquidate entries "as provided by law," it was reasoned in *Mason* that "a liquidation made pursuant to a provision of a statute subsequently declared to be unconstitutional is [not] a liquidation 'as provided by law'" (51 CCPA at 113).

Analogizing to *Mason*, the Customs Court in the instant case, although it expressed serious concern about the potential scope of the so-called "void liquidation doctrine" (App. 35–36), concluded that "[i]f a liquidation based on an unconstitutional statute is void, one founded on an unauthorized Presidential proclamation appears equally so" (App. 35).

An appeal by the government to the Court of Customs and Patent Appeals ensued. That court, dividing three to two, affirmed the decision of the Customs Court, stating (App. 23–24):

> What we do say here is that we have the same difficulty as did the Customs Court in finding

> a valid distinction between an unconstitutional statute on the one hand, and an invalid Presidential proclamation on the other—the effect is the same in both cases. * * * [W]e do not think it can fairly be said that Congress intended Section 514 to control in either instance.

Differing with the majority,[2] Judges Rich and Smith (who had agreed with the decision in *Mason*) supported the government's position that the protest here was barred under Section 514, stating (App. 28–29):

> The phrase in which an idea is here about to be encysted is "liquidation 'as provided by law'," taken from our *Mason* opinion. We used that phrase in rationalizing the decision in a case involving an *unconstitutional statute*. We were discussing nothing else. We are now being asked to apply it to a different situation, not involving an unconstitutional statute. And the next thing we know—if we affirm here—we will be asked to apply it to cases in which collectors have classified goods in the wrong statutory class and appraisers have valued them according to the wrong section of the statute, or have assessed them at the wrong value. * * * For it is indisputable that all such erroneous liquidations by collectors and valuations by appraisers

[2] The opinion of Judges Rich and Smith was nominally a concurring, rather than a dissenting, opinion only because their position led them to the same result as the majority opinion—dismissal of the protest. That was so, however, simply because of the procedural posture of the case. Their ground of decision differed radically from that of the majority, and would have had a substantially different effect. For them, the protest was too late and forever barred; for the majority, it was premature since no valid liquidation had taken place (see note 4, *infra*).

> are not "as provided by law." * * * [W]e do have the express mandate of Congress in section 514 that protests to actions of collectors which are displeasing to importers shall be filed within 60 days or they shall "be final and conclusive on all persons." That is what Congress intended. It is we who created an exception.

The "concurrence" then went on to state (App. 29–30):

> We have gone so far as to make a judicial (not Congressional) exception in the case of unconstitutional statutes. Now that it has been shown to us * * * where so-called "logical" extensions of that exception clearly lead, it behooves us to stop where we are and make no further exceptions, for we are on a collision course with express Congressional intent.

Accordingly, Judges Rich and Smith determined that the *Mason* holding should be confined to its facts, and that the protest here involved, grounded on the invalidity of an executive order and not the unconstitutionality of a statute, should be dismissed as untimely.

## REASONS FOR GRANTING THE WRIT

The decision below is, we believe, erroneous. It will operate to defeat, to a significant extent, the policies of repose which are embodied in the limitations period found in Section 514 of the Tariff Act. Should that decision, in its broader implications, be followed by other courts, its rationale would have a potentially serious impact on the course of litigation and administration under a variety of federal statutes. Even if not followed elsewhere, the consequences will be to unsettle a number of important matters which,

under the pertinent statutes, were thought to have been finally determined long ago, and to open the agencies whose decisions are reviewed by the Court of Customs and Patent Appeals to an extensive amount of stale litigation.

1. Section 505 of the Tariff Act of 1930 requires an importer to pay the amount of duties determined by the Collector in his "liquidation". Section 515 establishes an administrative and judicial procedure for obtaining a refund of any amount erroneously collected. Section 514, in pertinent respects a typical statute of limitations, makes the liquidation "final and conclusive on all persons" unless the importer initiates administrative and judicial review proceedings within 60 days by filing a protest with the Collector.

Sections 514 and 515 together provide the exclusive mode of review for all claims of erroneous liquidation and overpayment of duties—whether the asserted error was slight or flagrant, factual or legal, within the general area of the Collector's authority or plainly unauthorized. In each of these cases, review under Section 515 must be initiated by filing a protest with the Collector within 60 days of the liquidation. The result should be the same, we submit, whatever the alleged erroneous ground of the Collector's determination—whether he proceeded under an unauthorized Presidential Proclamation, proceeded under an unconstitutional statute, or took action which might be challenged as inconsistent with the statute. In all situations, we submit, review and correction

should follow the procedures and comply with the time limits prescribed in Sections 514 and 515.

The governing principle, we submit, is expressed in the numerous decisions holding that where the legislature prescribes a particular procedure for challenging the action of governmental officials or agencies that procedure must be followed, even where the challenge is upon constitutional grounds. *Bradley* v. *Richmond,* 227 U.S. 477, 485; *First Nat'l Bank* v. *Weld County,* 264 U.S. 450; *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, 342–346; *Yakus* v. *United States,* 321 U.S. 414, 434–435. Similarly, where Congress has provided a limitations period as an integral part of a statutory procedure for the assertion of a class of claims, the congressional determination must be accepted and followed even if a claim raises a constitutional issue. *Soriano* v. *United States,* 352 U.S. 270. And it follows *a fortiori* that where, as here, the challenge is not on constitutional grounds, the method of review prescribed by statute—including the limitations period explicitly provided for—should be given controlling effect.

The Court of Customs and Patent Appeals, in its decision in *Mason,* invoked the provision in Section 505 of the Tariff Act which states that the Collector shall "liquidate the rate and amount of duties to be paid on such merchandise as provided by law." The court reasoned that a liquidation based upon an unconstitutional statute was not a liquidation "as provided by law." Therefore, it concluded, in such a situation there existed no valid liquidation which would start the period of limitations set forth in Section 514

of the Act running (51 CCPA at 113). That analysis, we submit, is incorrect and does not effectuate the congressional purpose underlying Section 514's explicit limitations period.

In the first place, it is not at all clear that Congress intended the phrase "as provided by law" to describe anything more than compliance with the procedural requirements relating to liquidation. Indeed, considering the context in which that language appears, it would appear that that was all Congress had in mind. Moreover, as the concurring judges noted, the same rationale that the court below employed in *Mason* and extended in the present case would seem to apply to any improper liquidations made by a Collector, whatever the nature of the error and whenever discovered. For example, if the Collector based his determination on an inapplicable statutory provision, or if he misconstrued a statute or proclamation and thereby improperly classified the merchandise, or if he acted whimsically in choosing a rate, it could also be said that the liquidation was not "as provided by law." The very purpose of the right of action granted importers and consignees by Sections 514 and 515 of the Act is to give them an opportunity to test whether or not the Collector's liquidations are "as provided by law."[3]

[3] The Court of Customs and Patent Appeals in *Mason* relied upon a case holding that where the notice of liquidation was not given, the statute of limitations did not begin to run (see 51 CCPA at 112–113). Obviously, that case is not in point. Where the Collector commits a procedural error which prevents the importer or consignee from bringing a timely action, the government should not be able to take advantage of its own error by interposing the limitations defense. In such a case, the importer or consignee has not "slept" on his rights. But that

Thus, under this statute—as under any similar statute—the administrative decision is an "operative fact" which makes the prescribed limitations period start to run. Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374.

In addition, the language of Section 514 of the Act strongly confirms the correctness of the view we suggest. That section provides that "*all* decisions of the collector, *including the legality of all orders and findings entering into the same,* as to the rate and amount of duties chargeable, and as to *all* exactions of whatever character * * * and his liquidation or reliquidation of *any* entry * * * shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons" unless a protest is filed within sixty days after "such liquidation, reliquidation, decision, or refusal * * *." (Emphasis added.) No plainer language could be employed to indicate that *all* determinations of the Collector, regardless of their basis, are to be final and conclusive unless challenged within 60 days.[4]

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principle has no application here, where the consignee had notice of the Collector's liquidation and chose to forego filing a protest within the statutorily prescribed period.

[4] It should be understood that our disagreement with the Court of Customs and Patent Appeals in this case goes to the result, rather than merely to the ground of decision. While it is true that we agree that the case should be dismissed, we disagree with the lower court's dismissal for prematurity. Such a dismissal has the effect of requiring the Collector of Customs to liquidate the entry. The Collector has a mandatory duty under Section 505 of the Tariff Act to liquidate entries. If the prior liquidation was a nullity, he must liquidate the same entry

2. The decision below is inconsistent with well settled principles relating to the construction and application of statutes of limitation. As this Court stated in *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 314:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. * * *

That basic policy has nothing to do with the underlying merits of a claim. A claim may be stale, memories may have faded, witnesses may have disappeared, and evidence may have been lost, all to the same degree where the claim is that a statute is unconstitutional or that administrative action is beyond statutory authority, as where it is based upon some other asserted error in the action giving rise to the claim. The policy is one ingrained in our jurisprudence. It relates no less to attempts to obtain redetermination of the amount of customs duties than to

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again.) Once this is done, the importer may file a protest within 60 days, and the limitations defense—which is the only issue here—would, of course, no longer be open. On the other hand, if the dismissal were for late filing of the protest—the result supported by the two "concurring" judges below—then the Collector would not be required to reliquidate the entry, and the protest would be forever barred. Accordingly, the result of the case is substantially affected; this is not a situation in which the government agrees with the result and contests only the ground of decision.

efforts to litigate any other issue at a time subsequent to when the legislature has decided the matter should be regarded as closed.

No precedent exists for an exception to a limitations period expressly prescribed by statute such as that created by the court below. Indeed, what precedent there is appears to be directly to the contrary. For example in *Kavanagh* v. *Noble,* 332 U.S. 535, a taxpayer filed a refund claim after the expiration of the applicable two-year limitations period, contending that the Collector of Internal Revenue had based his assessment upon a regulation that had been declared "void" two months previously in *Helvering* v. *Janney,* 311 U.S. 189. This Court held the action to be barred, saying (332 U.S. at 538–539):

> It may well be that the taxpayer's refund claim was prompted by this Court's decision in *Helvering* v. *Janney, supra,* which set aside the Treasury regulation upon which the deficiency assessment was based. * * * But assuming that the *Janney* decision makes clear that the taxpayer here made an overpayment, the loss which he now suffers from an application of § 322(b)(1) is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. * * *

See also *Leffingwell* v. *Warren,* 2 Black 599, 604–606. Similarly, this Court has held that claims for damages under the "taking" clause of the Fifth Amendment must be filed within the prescribed period of limitations. See, *e.g., Soriano* v. *United States,* 352 U.S. 270.

We recognize that an older decision of this Court categorically stated that an unconstitutional law is "as inoperative as though it had never been passed" (*Norton* v. *Shelby County,* 118 U.S. 425, 442). That case was relied upon by the Court of Customs and Patent Appeals in its decision in *Mason* (51 CCPA at 113), and was again referred to in the opinion below (App. 23). More recent decisions of this Court, however, have reflected a more flexible and realistic approach to the general question of what effect, if any, a holding of invalidity has on earlier decisions made on the basis of the law later held invalid. Thus, in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371, 374, this Court stated that "[t]he past cannot always be erased by a new judicial declaration," and indicated that "an all-inclusive statement of absolute retroactive invalidity cannot be justified." Accordingly, the reliance of the court below on the *Norton* case, both in *Mason* and here, seems misplaced.

3. The decision below is of importance both in its immediate application to the customs, patent, and trademark cases within the jurisdiction of the Court of Customs and Patent Appeals and in its potential as a precedent which may be applied to other federal statutes by other courts.

We realize, of course, that this Court denied certiorari in the *Mason* case in 1965. But, it should be noted, the refusal by the Court of Customs and Patent Appeals in *Mason* to apply the statutory 60-day limitations period to liquidations under unconstitutional statutes had only a limited, immediate application. That was so because—as we pointed out in our peti-

tion for certiorari in *Mason* (p. 12)—decisions holding tariff statutes unconstitutional are rare. The present decision, however, has a much wider application. Four Presidential Proclamations setting duties have been declared "void" in recent years, and in each case the proclamation had been in effect for several years before the adjudication of invalidity.[5] It is anticipated that, if the decision below stands, other importers of merchandise subject to these proclamations will also attempt to take advantage of the holding below. Indeed, tariff duties are frequently established by means of a Presidential Proclamation.[6] Moreover, the rationale of the decision below would presumably be applied by the court below to patent and trademark cases as well. Another unsettling aspect of the decision is that it opens the door to attacks upon countless tariff proclamations which are not even currently operative and permits indefinite delay in challenging proclamations now on the books.

In addition, the significance of the principle announced by the court below obviously transcends cus-

[5] Presidential Proclamation No. 3211 (T.D. 54493), settting duties upon clothespins, was held void in *Falcon Sales Co.* v. *United States*, 47 Cust. Ct. 129; Presidential Proclamation No. 3108 (T.D. 53883), establishing duties on bicycles, was declared void in *United States* v. *Schmidt Pritchard & Co.*, 47 CCPA 152; Presidential Proclamation No. 3084 (T.D. 53755), on shelled peanuts, was held invalid in *United States* v. *The Best Foods, Inc.*, 47 CCPA 163; and Presidential Proclamation No. 3095 (T.D. 53808), also relating to peanuts, was declared invalid in *The Best Foods, Inc.* v. *United States*, 50 Cust. Ct. 94, C.D. 2396.

[6] For example, the "Kennedy Round" of tariff modifications was put into effect by Presidential Proclamation. 32 Fed. Reg. 19002–19149 (December 19, 1967).

toms litigation. Section 514 of the Tariff Act of 1930 is a typical statute of limitations, dating the period for bringing a claim based on the error of a government official or agency from the time the official action was taken. Reasoning identical to that adopted below could equally be asserted as the justification for entertaining suits otherwise barred under numerous other federal statutes granting a right of action to remedy the erroneous decision of a federal official or administrative agency. All that would be required is a contention that the official or agency had acted on the basis of an unconstitutional statute or regulation, or had acted beyond the authority granted by statute. It is hardly conceivable that Congress intended such a result.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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